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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re WENDY E., a Person Coming Under
the Juvenile Court Law.

B175721
(Los Angeles County
Super. Ct. No. CK50368)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

DANIEL E.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County. Thomas E. Grodin, Commissioner. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Lloyd W. Pellman, County Counsel, Larry Cory and Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

In this third appeal concerning minor Wendy E. (Wendy), Wendy's father, Daniel E. (father) contends that the juvenile court committed reversible error by summarily denying his Welfare and Institutions Code section 388¹ petition without a hearing and without the opportunity to present live testimony. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Wendy's Detention

On October 15, 2002, the Los Angeles County Department of Children and Family Services (DCFS) filed a section 300 petition on behalf of Wendy after she accused father of hitting her. Driving these proceedings is a contentious custody dispute between father and Susana B. (mother), Wendy's mother. After a hearing, Wendy was removed from her parents' custody and detained with a relative.²

Wendy's Return to Mother's Custody

Following DCFS's recommendation that Wendy be returned to her mother's custody, on October 10, 2003, the juvenile court held a contested hearing. The juvenile court returned Wendy to mother's custody, allowed father weekend and overnight visitation, and ordered further reunification services for father.³ The matter was then continued to November 13, 2003, for a progress report.

DCFS Report for the November 13, 2003, Hearing

DCFS submitted a report for the November 13, 2003 hearing. Included was a letter from Dr. Karen Jackson, the therapist who had been providing weekly counseling for mother since April 1, 2003, and conjoint counseling for mother and Wendy since

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² Mother and Wendy appealed the juvenile court's removal order. On January 15, 2004, we affirmed. (See *In re Wendy E.* (Jan. 15, 2004, B165749) [nonpub. opn.])

³ Father appealed this juvenile court order. On July 15, 2004, we affirmed the order, and remanded the matter for DCFS compliance with proper notice under the Indian Child Welfare Act. (See *In re Wendy E.* (July 15, 2004, B170580 [nonpub. opn.])

June 30, 2003. Dr. Jackson described the family as being under “significant stress due to the on-going custody dispute between Wendy’s parents.” The bulk of the stress, unfortunately, fell on Wendy. For example, Wendy revealed to Dr. Jackson that father had threatened to kill himself if Wendy went to live with mother. Dr. Jackson characterized father’s statement as “a form of severe emotional abuse that has taken [its] toll on Wendy’s mental well-being.”

Dr. Jackson continued that since Wendy’s return to mother’s custody, father’s emotional abuse had escalated, including leaving hostile messages on mother’s answering machine for Wendy, criticizing her for choosing to live with mother. In response, Wendy felt guilty and responsible for father’s well-being. Wendy was anxious, depressed, and suicidal. She told Dr. Jackson that she wanted to end all contact with father in order to relieve the daily stress that she experienced because of him. Dr. Jackson recommended that for the time-being, all contact between Wendy and father be suspended, until father behaved appropriately.

The DCFS report also documented Wendy’s progress with mother. During an unannounced visit, the social worker observed a positive interaction between Wendy and mother. Wendy also reported positively about the most recent visit she had had with father. Further, the social worker confirmed that all parties (mother, father, Wendy, and mother’s boyfriend) were participating in counseling with licensed therapists. All parties appeared to be complying with the case plan.

The following week, however, father left hostile messages on mother’s answering machine, demanding that he have overnight visitation with Wendy every weekend, instead of every other weekend as ordered by the juvenile court. He addressed the message to Wendy, cursed, told Wendy not to listen to mother, and accused mother’s boyfriend of being a child molester. He then called the social worker and supervising social worker for assistance and, when he did not get the response he wanted, he threatened to sue them. He refused to call the social worker to schedule a Thanksgiving visit with Wendy.

On November 3, 2003, father failed to show up for a conjoint counseling session with Wendy.

On November 6 and 7, 2003, Wendy called the social worker to inform her that she did not want to go on the next weekend visit with father because he was continuing to badger her about living with mother. Father told Wendy that mother was manipulating her and that mother's boyfriend was a child molester who Wendy was protecting. The social worker encouraged Wendy to attend the visit and speak to father about his inappropriate comments.

On November 10, 2003, mother called the social worker and told her that, at Wendy's request, she had driven her to father's residence to retrieve her softball uniform. Mother waited for Wendy a half block away while Wendy retrieved the uniform. Later, mother received a telephone call from father stating that she did not supervise Wendy properly because she had broken into his home and stolen things, including money. Upon hearing father's accusations, the social worker called father's landlord and confirmed Wendy's account of what had occurred. She had asked the landlord to open father's unit to retrieve clothing; the landlord complied and asked Wendy to lock the door on the way out; Wendy was in the apartment for a short period of time and then left; and at no time did Wendy break into the apartment. The social worker told Wendy that before entering father's apartment, she should have called him and asked permission. Later, father threatened Wendy that if she did not agree to a weekend visit, he would call the police and report that she had burgled his apartment.

The DCFS Report is Deemed a Section 388 Petition to Suspend Father's Visits

At the November 13, 2003, hearing, DCFS requested the juvenile court deem the DCFS report a section 388 petition for modification of previous court orders, asking that the juvenile court set a hearing on the issue of whether father's visits should be suspended. Mother and Wendy joined in the request.

The juvenile court granted the request and suspended all contact until the hearing, set for December 12, 2003.

At the Hearing on DCFS's Section 388 Petition, Father's Visits are Suspended

At the hearing, the juvenile court received into evidence DCFS's November 13, 2003, report, Dr. Jackson's letter, and affidavits from Wendy. Thereafter, it heard oral testimony.

First, Dr. Jackson testified that Wendy was extremely depressed, tearful, anxious, and thought about suicide daily. Wendy admitted that she was cutting herself.

Dr. Jackson identified Wendy's relationship with father as playing a role in her suicidal thoughts. He made her feel guilty for living with mother and had threatened to commit suicide himself if she decided to live with mother. Regarding father's answering machine messages, Dr. Jackson found them obsessive, hostile, and badgering. She told mother not to allow Wendy to listen to his messages anymore. Since Wendy's visits with father were suspended, Dr. Jackson noticed significant changes in Wendy -- the depression lifted, she no longer cut herself, and she reported not feeling suicidal.

Dr. Jackson further testified that she believed that conjoint counseling sessions between Wendy and father were detrimental to Wendy; father needed to curb his own behavior and realize how harmful it was to Wendy before contact could resume.

Because Wendy was assertive with mother, Dr. Jackson was not concerned that mother was pressuring Wendy to make certain disclosures.

Next, Joan Tracy Rollins, the social worker, testified. She confirmed that father had reported the alleged break-in to her.

Father then testified. He stated that he wanted to continue visiting his daughter. He enrolled her in individual therapy in November 2002, and began conjoint sessions at the same time. For approximately one year, Wendy saw her individual therapist about once a week and conjointly with father about twice per month. During those conjoint sessions, Wendy never once mentioned not wanting to visit father. Further, father began his own individual therapy in June 2003.

Regarding the alleged break-in, father was upset because Wendy had entered his home without his permission. He confronted her about the missing money, but she denied taking it.

Father denied leaving any hostile messages on mother's answering machine.

Father admitted that Wendy had told him that she no longer wanted to visit him. Since the juvenile court had granted mother custody, his relationship with Wendy worsened.

Finally, Wendy's attorney offered stipulated testimony that Wendy did not desire to have visitation with father.

After hearing argument from counsel, the juvenile court granted DCFS's request to suspend father's visits. "I'm very concerned about [Wendy] -- her health. I know the father is concerned about his daughter too. That's what makes it such a -- such a difficult and unfortunate case, really. I'm not suggesting for a minute that he doesn't. But there's got to be a break here in order for Wendy to stabilize." "The well-being of Wendy requires that visits be suspended for now. We're not talking permanently at this point. We're talking just for now. It would jeopardize her safety, based on what I've heard and read, to continue the visitation."

A review hearing was then set for April 9, 2004.

Father's Section 388 Petition

On April 2, 2004, father filed a section 388 petition for modification, requesting that the juvenile court place Wendy in father's custody or, alternatively, place her in foster care. In support of his petition, father made four allegations: (1) Wendy was "being abused and threatened"; (2) on February 1, 2004, Wendy had a blood-alcohol level twice the legal limit; (3) on July 28, 2003, Wendy was cited for illegally driving a power boat; and (4) Wendy broke into father's apartment on November 7, 2003. Father claimed that these allegations established that mother could not care for Wendy properly or keep her safe, thus warranting a change in her custody.

The juvenile court denied the petition without a hearing, finding that the petition failed to state facts to support the allegations, the petition failed to cite new evidence or changed circumstances, the petition failed to show how the modification would serve Wendy's best interests, and father failed to notify any of the parties of the petition filing.

The April 9, 2004, Review Hearing

DCFS filed a report for the April 9, 2004, hearing. DCFS reported on the progress Wendy was making in mother's care. She actively was involved in softball and was maintaining a 3.0 grade point average. She was featured in the local newspaper for her outstanding efforts as the star pitcher for the softball team. Both Wendy and mother continued in therapy; father, however, failed to show evidence of compliance with counseling.

On February 1, 2004, mother allowed Wendy to attend a "Punk party." Wendy drank to the point of having a blood-alcohol level of twice the legal limit. When classmates returned her home, Wendy stumbled and fell, causing scratches to her face. When mother saw the condition Wendy was in, she called the police. When questioned later, Wendy admitted to her behavior and stated that it was the first time she drank. She stated that she would never do it again. Mother confirmed that this was an isolated incident. Following this incident, mother did not allow Wendy to attend parties and requested an increase in Wendy's therapy sessions. Wendy was open to discussing the incident with her therapist. Dr. Jackson confirmed that Wendy had made significant progress and continued attending conjoint therapy with mother.

Wendy stated that she would be more comfortable interacting with father if he participated in counseling. To date, father continued to threaten police action regarding the November 2003 alleged break in. He also violated the juvenile court's no-contact order by calling Wendy at least three times and by calling her softball coach and accusing Wendy of having attended practice inebriated.

DCFS recommended terminating juvenile court jurisdiction with a family law order granting the parents joint legal custody and mother sole physical custody. At

father's request, the juvenile court set a contested hearing and, on May 26, 2004, granted father monitored visits.

This timely appeal from the juvenile court's order denying father's section 388 petition followed.⁴

DISCUSSION

I. *Standard of Review*

The parties spend much time debating the applicable standard of review. Father asks us to conduct a de novo review of the trial court's decision denying a hearing, arguing that *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1416 establishes that standard of review. DCFS disagrees and argues that the proper standard of review is abuse of discretion, citing the many cases which apply that standard. (See *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 808; *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1451.) We need not enter into this controversy, since we would affirm under either standard.

II. *The Trial Court Properly Denied Father's Section 388 Petition Without a Hearing*

Section 388 provides, in relevant part, that "[a]ny parent . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of the court previously made [¶] . . . [¶] If it appears that the best interests of the child may be promoted by the proposed change of order . . . , the court shall order that a hearing be held." Thus, the juvenile court is required to grant a hearing on a section 388 petition only when (1) the petition makes a prima facie showing of changed circumstances warranting a change or modification of court orders, and (2) the proposed change would be in the best interests of the child. (*In*

⁴ Father also filed a notice of appeal from the juvenile court's order granting him monitored visits. That issue is not before us at this time.

re Marilyn H. (1993) 5 Cal.4th 295, 310; *In re Jeremy W.*, *supra*, 3 Cal.App.4th at pp. 1413-1414.)

As the juvenile court correctly found, father's section 388 petition did not present prima facie evidence triggering a hearing on father's request. Father made four allegations in support of his section 388 petition, each of which was insufficient to warrant a hearing.

First, his general averment that Wendy was being abused while in mother's care was conclusory, unfounded, and unsupported by any specific evidence. (*In re Anthony W.*, *supra*, 87 Cal.App.4th at p. 250 [“[S]pecific allegations describing the evidence constituting the proffered changed circumstances or new evidence’ is required”].)

Second, father claimed that in July 2003, Wendy had illegally driven a motorized boat. As with his first allegation, he did not provide any specific detail regarding this allegation, such as the circumstances regarding the incident and what consequences Wendy suffered as a result. (*In re Anthony W.*, *supra*, 87 Cal.App.4th at pp. 250-251.) Moreover, as framed in the petition, this single incident does not raise doubts about mother's ability to care for Wendy.

Third, father again accused Wendy of breaking into his apartment in November 2003 and stealing from him. This evidence was not new as it was before the juvenile court at the December 12, 2003, hearing at which time the juvenile court suspended father's visits. Moreover, DCFS had investigated the incident and concluded that it was not a burglary. Wendy's social worker advised her to seek father's permission before entering his apartment when he was not home, and there is no indication that any similar incident has occurred since.

Finally, father cited to the night Wendy became intoxicated at a party. The fact that Wendy got drunk once at a party does not compel the conclusion that it would be in her best interests to be removed from mother's custody, let alone placed in father's custody given the juvenile court record of what had occurred six months prior,

culminating in the suspension of Wendy's contact with father. (See *In re Jamika W.*, *supra*, 54 Cal.App.4th at p. 1451 [in determining whether to grant a hearing, the juvenile court is not limited strictly to the contents of the petition, but may also consider facts developed over the course of the proceedings].)

It follows that father's constitutional due process rights were not violated.

DISPOSITION

The juvenile court's order denying father's section 388 petition without a hearing is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
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